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In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77 - 178

WILLARD E. ROBERTSON,

Petitioner

versus

EDWARD F. WEGMANN, EXECUTOR FOR CLAY L. SHAW, *ET AL.*,

Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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EDWARD F. WEGMANN, EXECUTOR FOR CLAY L. SHAW, *ET AL.*,
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On Writ of Certiorari to the Court of Appeals For The Fifth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 545 F2d 980, and is reproduced as Appendix A to the Petition for Certiorari (p. 14). The decision of the United States District Court for the Eastern District of Louisiana, reported at 391 F.Supp. 1353, appears as Appendix D to the Petition (p. 32).[1]

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1. All items which Sup. Ct. Rule 36 requires for the appendix to this brief on the merits were previously printed as the Appendix to the Petition for Certiorari, which will hereinafter be cited simply as "App.", with the appropriate section and page (*e.g.*, App. E, p. 71). A separate appendix referring to the Appendix to the Petition for Certiorari, and reproducing all docket entries below, has been printed and filed herewith.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on January 24, 1977, and the order denying the request for rehearing was entered on June 20, 1977. The petition for certiorari was filed on August 1, 1977, and granted December 5, 1977. The jurisdiction of this Court rests on 28 USC 1254(1).

STATUTES INVOLVED

42 USC 1983, and Louisiana's survivorship statute, Civil Code Article 2315, are reproduced as App. E (pp. 71-72). The issue before the Court turns on 42 USC 1988 which provides:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause,

and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

QUESTIONS PRESENTED

1 - May a federal court, in determining whether an action under §1983 of the Civil Rights Act survives the death of the plaintiff, refuse to follow the dictates of §1988 of that Act which provides that -- inasmuch as the Civil Rights Act does not make any provision with respect to survival of actions under § 1983 -- the court shall look to, and be governed by, the law of the State in which the case is pending, and instead, judicially create a new "federal common law" of absolute survivorship, merely because the explicit law of the State provides for survival of such actions for personal damages only in favor of certain designated beneficiaries, none of whom was left by the deceased plaintiff?

2 - Can the decision of the court below be allowed to stand when there has never been in existence any federal common law of survivorship of civil actions -- to the contrary, the long-standing rule of common law being that an action abated with the death of the injured party -- and there is no real authority for the federal court now to create a federal common law of survivorship of an action under §1983 of the Civil Rights Act when Congress itself did not see fit legislatively to ameliorate the existing rule, except by enacting § 1988 of the Civil Rights Act to incorporate as federal law the state law of survivorship currently existing in the forum?

STATEMENT OF THE CASE

Clay L. Shaw brought this action against Jim Garrison

and others, including petitioner,[2] asserting a claim for damages under §1983 of the Civil Rights Act (42 USC 1983) by reason of his having been prosecuted for conspiracy to assassinate President Kennedy and, subsequently, for perjury charges growing out of the original prosecution. The court's jurisdiction was invoked pursuant to 28 USC 1331 and 1343.

While the action below was pending, plaintiff Shaw died. He was survived by neither spouse, parent, child, brother or sister, nor any other dependent kin. The only person now having an interest in the damages claimed in this action is plaintiff's sole residuary legatee, a friend. However, the district court, over the objection of defendants, entered an *ex parte* order, permitting the executor of Shaw's estate to be substituted as the plaintiff in this action.

Defendants moved to dismiss the action on the ground that it had been extinguished by Shaw's death, because under the law of Louisiana (Louisiana Civil Code, Article 2315), which must be extended to and govern this case under the dictates of §1988 of the Civil Rights Act, there is no party in whose favor the right of recovery legally survives.

The district court denied the motions, but certified its order, and on defendants' interlocutory appeal, the Fifth Circuit affirmed. The appellate court recognized that all

2. The defendants-appellants below were Jim Garrison, the District Attorney for the Parish of Orleans at the time the action was filed; an asserted member of Garrison's staff; and three private citizens, including petitioner Williard E. Robertson. Only Robertson petitioned for certiorari, but all other parties below have an "interest in the outcome" and have been designated as respondents in addition to Shaw's executor (U.S. Sup.Ct. Rule 21, par. 4).

parties are in agreement, and accepted the holding of the lower court, that under the law of Louisiana, plaintiff's claim under §1983 would have abated, since an action for damages for personal injuries, such as the instant one, survives the death of the plaintiff only in favor of certain designated beneficiaries customarily recognized as dependent relatives -- those having a close family tie to a deceased plaintiff -- that is, his spouse, children, parents or siblings. *Shaw vs Garrison*, 545 F2d 980, 982 (CA 5-1977); App. A, p. 16.

While conceding that it must look to the law of Louisiana under §1988 of the Civil Rights Act, the Fifth Circuit held, however, that inasmuch as the law of Louisiana does not provide for survival of this particular action, since plaintiff Shaw did not leave any of the designated familial beneficiaries, it was "inconsistent", not with the "laws of the United States", but with the "policy" or "purposes" of the Civil Rights Act and would be rejected. 545 F2d at 983; App. A, pp. 19-20. The Fifth Circuit, like the district court, then formulated a new "federal common law" of absolute survivorship of civil rights actions under §1983 when none had existed before. 545 F2d at p. 984 *et seq.*; App. A, p. 22 *et seq.*

SUMMARY OF ARGUMENT

1 - Since it is recognized beyond question that the Civil Rights Act is silent as to survival of actions under §1983, and the Louisiana law of survivorship cannot be said, logically or legally, to be inconsistent with that law or any other "laws of the United States", the federal courts must follow the dictates of §1988 of that act which directs that

the state law "shall be extended to and govern" the case. That the law of Louisiana is not inconsistent with "the laws of the United States" is fully demonstrated by reference not only to the Civil Rights Acts themselves and their legislative history, but to all other federal statutes providing for survival of actions.

2 - There is no real precedent or basis whatever for the federal courts to fabricate a "federal common law" of absolute survival of actions under §1983, rather than adopting as federal law (or "federal common law", if one will) the law of the state of the forum as commanded by §1988, especially when Congress has consistently refused otherwise to ameliorate the long-existing common law rule as to abatement of actions and to bring into the Civil Rights Acts any federal rule of survival of civil rights actions except the limited right of survivorship provided in §1986 for actions under §1985.

ARGUMENT

I - THE LOUISIANA LAW OF SURVIVORSHIP IS NOT INCONSISTENT WITH LAWS OF THE UNITED STATES AND SHOULD HAVE BEEN APPLIED TO THIS ACTION PURSUANT TO §1988.

Section 1988 of the Civil Rights Act clearly spells out the course of action which must be followed in situations such as the instant case. Congress, in its wisdom in formulating the applicable legislative policy for civil rights, commanded that:

> "The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this

> chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, . . . the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . ."

The appellate court recognized that, as was held by this Court in *Moor vs County of Alameda*, 411 US 693, 702 (1973), by the Fifth Circuit in *Brazier vs Cherry*, 293 F2d 401 (CA 5-1961), and by other circuits [*e.g., Pritchard vs Smith*, 289 F2d 153, 155 (CA 8-1961); *Hall vs Wooten*, 506 F2d 564 (CA 6-1974)], the Civil Rights Act is entirely silent as to survival of actions under § 1983 - that there is a "gap" in the law, that it is "deficient", in that respect (545 F2d 983).

It agreed with defendants that, in such a situation, "§1988 instructs federal courts as to what law to apply in causes of actions arising under federal civil rights acts. *Moor vs County of Alameda*, 1973, 411 US 693, 703" (545 F2d 982); that under that section, the Court is "directed to look to state law to fill the interstices in the federal

provisions" (*id.*); and that the Court "must apply Louisiana's survivorship law unless that law 'is inconsistent with the Constitution and laws of the United States' " (545 F2d 983).

The dispositive provision of Louisiana law is found in Civil Code Article 2315, as amended in 1960, which states in part:

> "The right to recover all other damages [*i.e.*, excluding 'damages to property'] caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child or parent surviving."

It is clear that the law of Louisiana does provide for survival of actions for personal injury of whatever nature.[3] It is also settled law that under Article 2315, pending actions for personal damages, as opposed to property damages, only survive in favor of the named classes of beneficiaries. *J. Wilton Jones Co. vs Liberty Mutual Insurance Co.*, 248 So. 2d 878 (La.App. 4th - Dec. 16, 1970), writ. den. 259 La. 61, 249 So.2d 202 (1971); *Austrum vs City of Baton Rouge*, 282 So.2d 434, 439 (La.-1973).

3. Thus, Louisiana is much more liberal in its view of survivorship than many states which deny survivorship entirely in actions for malicious prosecution, libel, slander, etc. See Addendum 2 hereto.

The Fifth Circuit recognized in its opinion below that all parties were in agreement, and accepted the holding of the district court, that under Civil Code Article 2315 plaintiff's claim under §1983 has abated (545 F2d 982).

The Fifth Circuit improperly concluded, however, that "because Louisiana's survivorship provisions would cause Shaw's pending civil rights action to abate, we find that Louisiana law is inconsistent with the broad remedial purposes embodied in the Civil Rights Acts", and decided that it would "decline to apply Louisiana law of survival" (545 F2d 983).[4]

The decision of the Fifth Circuit - like that of the district court - is a classic example of circular reasoning assiduously shunned by logicians and philosophers. Having found that the federal law is silent as to survival of civil rights actions, and that the Court must therefore go to the state law, as directed by §1988, the Fifth Circuit found that the state law - since it would not allow the action to survive in favor of merely the friend of the deceased plaintiff - is incon-

4. By way of seeking support of its action in rejecting the assertedly "inhospitable law" of the state, the Fifth Circuit cited *Pierson vs Ray*, 386 US 547 (1967) and *Jobson vs Henne*, 355 F2d 129 (CA 2-1966), but those cases involved determination of the applicability of certain special defenses to civil rights actions, and not the application under §1988 of substantive rights of survivorship as provided by state statutes. The Fifth Circuit also relied on *Franklin vs City of Marks*, 439 F2d 665 (CA 5-1971) as an instance where it "refused to apply a ten-day statute of limitations" because it would frustrate the aim of the Civil Rights Act, but the holding in that case was simply that the ten-day period "was not a true statute of limitations in the proper sense", but was instead "simply a procedural limitation on the parties' use of appellate process" (p. 668). The court went on to conclude that "the court must revert to the state, catch-all statute of limitations", and in fact did so. None of those decisions is apposite here. See also *post*, pp. 18-20.

sistent with the very federal law which it had held contains no provision as to survival of actions.

As the Eighth Circuit stated in *Pritchard vs Smith*, 289 F2d 153, 157 (CA 8-1961), "no inconsistency results from the application of state survival law", for the simple reason that "no federal statute specifically deals with the substantive issue of survival".

This Court in *Moor vs County of Alameda*, 411 US 693, 702 and fn. 14 (1973), held that "inevitably existing federal law will not cover every issue that may arise in the context of a federal civil rights action. One such problem has been the survival of civil rights actions under §1983 upon the death of either the plaintiff or defendant".

Moreover, § 1988 does not speak of inconsistency with unexpressed "purposes" or "policies" which may have influenced the enactment of federal laws, but inconsistency with the "laws" themselves, *i.e.*, statutes of the United States (as distinguished from the more generic, philosophic federal "law", which also includes decisional, common and natural law). *Cf. National City Bank vs National Sec. Co.*, 58 F2d 7, 9 (CA 6-1932); *Fitzpatrick vs Simonson Bros. Mfg. Co.*, 86 Minn. 140, 90 N.W. 378, 381 (1902); *Gilliam vs California Employment Stabilization Commission*, 130 CA2d 102, 278 P2d 528, 536 (1955).

Nor has either of the courts below been able to cite any other federal laws with which the Louisiana law of survival can be said to be inconsistent. To the contrary, all of the federal laws which provide for survival of actions restrict that right to certain designated beneficiaries just as does the

Louisiana Civil Code.[5]

It is fundamental logic that nothing can be inconsistent with something that does not exist.

Nor can the decision of the court below be properly predicated on the proposition that in enacting the Civil Rights Acts, Congress intended for actions under §1983 to survive without any limitation or restriction whatever.

To the contrary, in the course of the legislative process leading to the adoption of the Civil Rights Act of 1871, Congress expressly rejected a proposed amendment which would have provided for a broad survival of actions.[6] Instead, in § 1986 of the Civil Rights Act, Congress provided that when death results from an act of "invidious discrimination" prohibited by Section 2 (§1985) of the Act [*Griffin vs Breckenridge*, 403 US 88 (1971)], the cause of action under that section survives only "for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased".

Thus, under the appellate court's view of the "policy" or "purposes" of the Civil Rights Acts as adopted by Congress,

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5. The Federal Employers' Liability Act, 45 USC 51, *et seq.*; the Jones Act, 46 USC 688; the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 908-909; and the Death on the High Seas Act, 46 USC 761, *et seq.*

6. See Cong. Globe, 42d Cong. 1st Sess., 704 (1871). The House refused to concur with the Senate's proposal (*id.* at 725). In conference, the Senate agreed to drop the amendment, and the present §1986 was adopted (*id.* at 804). See also, "Federal Civil Rights Act Incorporates State Wrongful Death and Survival Laws", 14 Stanford L. Rev. 386, 392 fn. 34 (1962).

there would be the incongruity of an extremely limited survivorship under the "Ku Klux Act" when the plaintiff dies as a result of the proscribed "invidious discrimination" under §1985, but an absolute, all encompassing survivorship of an action were death to follow what one might term the "garden variety" type of civil rights violation proscribed by §1983 of that Act.

§1988 was originally adopted by Congress in 1866 as part of an earlier Civil Rights Act (Act Apr. 9, 1866, C.31, §3, 14 Stat. 27), together with the predecessor (in much different context) of what ultimately became §1983. Careful study of the legislative debates of the 1866 Act shows that the major concern at that time (prior to adoption of the 14th Amendment) was that the constitutional power to protect individual rights then rested only in the states, not the federal government.[7] Repeatedly, in considering various parts of the bill other than the second part of Section 3 (§1988), there were objections raised as to infringement of states' rights. The referral to and adoption of state law under the second part of Section 3 was never the subject of any debate whatever,[8] since obviously it was deemed to constitute a recognition of the law of the forum state as controlling. What a furor would have resulted if any mem-

7. See, *e.g.*, Congressional Globe, 39th Cong. 1st Session, pp. 497, 499, 504, 522-530, 569-578, 594-607, 1265, 1290-1296.

8. *Cf.* Senator Davis' attack on the provision of Section 3 permitting removal of an action from state to federal court on the ground it deprived the states of their right to try their own cases (Congressional Globe, 39th Congress, 1st Session, pp. 598-599). While the Senate ultimately approved certain House amendments to the first part of Section 3 with reference to the Freedman's Bureau, the second part of that section (now §1988) was adopted as originally drafted without any question.

ber of Congress had even suggested that a federal court could refuse to apply the pertinent state law under Section 3, and instead formulate a federal common law of survivorship of actions under the Civil Rights Act!

After adoption of the 14th Amendment, the Civil Rights Act of 1866 was re-adopted by Congress in 1870 (the Enforcement Act, May 31, 1870, c. 114, 16 Stat. 144). Again Congress made no effort to provide for survivorship of actions nor did it otherwise evidence any intent to militate against the applicability of state law under §1988.

In 1871, Congress passed the Ku Klux Act after considerable debate, and Sections 1983, 1985 and 1986 came into effect substantially as they now stand (Act Apr. 20, 1871, 17 Stat. 13, c. 22; Congressional Globe, 42d Cong., parts 1 and 2). Despite the apparent protestations of Representative Shellabarger, Congress refused to provide for any general survivorship of actions under the Civil Rights Acts, but only adopted in §1986, the restrictive survivorship of actions under §1985 alone.[9] Moreover, once again, there was no attempt to amend in any respect §1988 which had then been in effect for five years.

If the underlying "policies" or "purposes" of the Civil Rights Acts were in fact that all actions under those acts must survive death without any limit or restriction whatever (whether as to wrongful-death or wrongful-injury actions, or designated beneficiaries and dependent kin as distinguished from succession representatives, etc.) - which is, of course, the result inherent in, and dictated by, the lower courts' reasoning - then it is obvious that Congress would

9. See fn. 6, *supra*.

simply have said so in enacting the Civil Rights Acts, and would not have relied on its enactment of §1988 commanding the federal courts to be governed by the common law of the state, as amended by state statutes. Clearly, in so enacting §1988, Congress could not have intended that any limitations on survivorship imposed by those state statutes should be ignored by the federal courts.[10]

To paraphrase this Court in *Moor, supra*, 411 US at p. 709, "in interpreting the statute it is not our task to consider whether Congress was mistaken in 1871 in its view of the limits [as to survivorship]; rather, we must construe the statute in light of the impressions under which Congress did in fact act". It cannot be questioned that in 1871, when Congress was considering the Civil Rights Act, the prevailing law was that an injured party's claim was extinguished upon his death [see *Mich. Cent. R. R. vs Vreeland*, 227 US 59, 67 (1913)].

Moreover, as Judge Brown stated in *Brazier vs Cherry*, "The law has long and frequently stated and restated . . . that amelioration of the harshness of this principle [of non-survivorship] must come from legislation" (293 F2d at p. 403).

Since Congress did not so legislate in enacting the Civil Rights Acts, it was error for the courts below to hold that a policy or "purpose" of absolute survivorship had been embraced in the Civil Rights Acts by Congress which rendered the Louisiana law of survivorship "inconsistent" with that

10. *Cf. Baker vs F & F Investment*, 420 F2d 1191 (CA 7-1970), cert. den. 400 US 821, stating in part: "Congress would surely have spoken more explicitly had it intended that civil rights actions should endure forever." (p. 1196).

law so as to preclude the application of that state law to this action as directed by §1988.

II - THE FIFTH CIRCUIT ERRED IN FABRICATING A FEDERAL COMMON LAW OF ABSOLUTE SURVIVORSHIP OF ACTIONS UNDER §1983

Having refused to apply to this action the Louisiana law of survivorship in favor of certain designated beneficiaries, as dictated by §1988, the Fifth Circuit found itself facing a complete absence of any provision in the Civil Rights Acts for survival of this action, no applicable state statute of survivorship, and a long-established common-law rule of non-survivorship of actions for personal injuries. Undaunted, it proceeded to fabricate a "federal common law" of absolute survivorship of civil rights actions, when no such federal common law had previously existed.

That holding militates against the very positive holdings of the Fifth Circuit itself in *Brazier vs Cherry*, 293 F2d 401 (CA 5-1961), that any "amelioration of the harshness of the principle [the long - and well-established common-law rule of abatement of actions upon death of the injured person] must come from legislation" (p. 403), and that "we are of the clear view that Congress adopted *as federal law* the currently effective state law on the general right of survival. This was done by §1988" (at p. 405 - emphasis supplied).[11]

11. See also *Wolfer vs Thaler*, 525 F2d 977 (CA 5-1976), fn. 1 at p. 978. The holding in *Brazier* served to emphasize, as pointed out in *Holmes vs Silver Cross Hospital of Joliet, Illinois*, 340 F.Supp. 125, 129 (ND Ill.-1972), that "as a matter of statutory construction of 42 USC §§1983 and 1988, state law in relation to survival of actions must be ascertained and adopted as the law governing the issue of survival of a federal civil rights action in the absence of any specific Congressional enactment on the subject" (340 F.Supp. at p. 129). In

"In a federal civil rights action where the person who has been deprived of his right has died, the action survives for the benefit of the estate if the applicable state law creates such a survival action." *Spence vs Staras*, 507 F2d 554, at 557 (CA 7-1974). While sustaining the representative action as surviving under Illinois law, the court dismissed plaintiff's individual action since it did not survive under the state law.

In *Pritchard vs Smith*, 289 F2d 153 (CA 8-1961), the Eighth Circuit, noting that §1983 does not specifically treat with the survival issue and that under §1988, resort should be had to state law, held "that the court should look to the Arkansas law to determine the survival issue here present". Since the Court found the action to be one for "wrongs to the person other than libel and slander", it survived under the Arkansas law. 289 F2d at p. 158.

The Sixth Circuit has held, in *Hall vs Wooten*, 506 F2d 564, 569 (CA 6-1974), that, "following section 1988", the court must "look to state law in fashioning federal common law", and that "we adopt as federal common law, the law of Kentucky, the forum state, which provides for the survival of actions for personal injury [quoting the state statute]. Since none of the exceptions [that is, actions for slander, libel, criminal conversion and malicious prosecution] is applicable here, we hold that the cause of action alleged in this case survived the death of the injured person" (p. 569).

In the relatively recent case of *Dean vs Shirer*, 547 F2d

(footnote 11 - continued)
Holmes, as is true in *Evain vs Conlisk*, 364 F.Supp. 1188, 1191 (ND Ill.-1973), aff'd 498 F2d 1403 (CA 7-1974), plaintiff's claims were dismissed because, under applicable state law, they did not survive in favor of that person .

227 (CA 4-1976),[12] the Fourth Circuit carefully analyzed plaintiff's §1983 claim to determine if it survived under the laws of South Carolina, which it obviously acknowledged as governing the disposition of the case. The court applied the state statute which does not provide for absolute survival, but for survival of only certain types of action. After quoting the South Carolina statute involved, the Fourth Circuit stated that "exceptions to such survivorability (sic) of actions for personal injuries are actions for malicious prosecution, slander, fraud and deceit" 547 F2d at 229. The Fourth Circuit thus recognized that if Dean's action had been in the nature of one for malicious prosecution, slander, fraud or deceit, it would not have survived. Only the appellate court's categorization of the action as one for false imprisonment or assault allowed it to survive.[13]

Even assuming that the appellate court was entitled to look to "federal common law", the court also erred in creating a federal common law of absolute survival of civil rights actions in favor of the personal representative of the deceased. It is well established that at common law - whether state or federal - an action for personal injury does not survive the death of the injured party. "Nothing is better

12. Although *Dean* was actually decided before *Shaw*, it was not published until after the decision below and was not considered by the Fifth Circuit.

13. In the instant case, while it is clear that the action for damages under §1983 would be deemed to be in the nature of one for malicious prosecution [*cf. Allen vs Gifford*, 462 F2d 615 (CA 4-1972), cert. den. 409 US 876 (1972)], there is no question that Shaw's action is of the category which would survive under the law of Louisiana if Shaw would have left a wife, child, father, mother, brother or sister. Because Shaw was not survived by any such designated familial beneficiaries, however, the law of Louisiana dictates that this action does not survive.

settled than that at common law the right of action for an injury to the person is extinguished by the death of the party injured."[14]

The court below relied on the cases of *Lefton vs City of Hattiesburg*, 333 F2d 280 (CA 5-1964), *Sullivan vs Little Hunting Park, Inc.*, 396 US 229 (1969), and *Bell vs Hood*, 327 US 678 (1946), as authority for its "formulation" of federal common law to allow survival of this action (545 F2d 984, 985). However, *Lefton* involved simply a procedural question as to the proper nature of a petition for removal of several criminal prosecutions to federal court to protect petitioners' civil rights, and the language of the decision quoted below as to use of common law powers to facilitate civil rights proceedings referred to the statutory provisions of §1988 (333 F2d at p. 284), which the Fifth Circuit refused to implement in the instant case. Similarly, this Court in *Sullivan vs Little Hunting Park, Inc.*, relied on §1988, stating that "both federal and state rules on damages may be utilized". In *Bell vs Hood*, this Court was considering a narrow issue of jurisdiction to hear a suit for recovery of damages, under "federal question" jurisdiction, for violation of plaintiff's Fourth and Fifth Amendments rights, and observed that when a federal statute provides for a general right to sue for invasion of legal rights, the courts may use "any available remedy" to make good the wrong.

Thus, in all three cases, there was already in existence an "available remedy" or "federal and state rules" to be ap-

14. *Mich. Cent. R. R. vs Vreeland*, 227 US 59, 67 (1913). See *Moor vs County of Alameda*, 411 US 693 at p. 702, fn. 14. In *Pritchard*, 289 F2d 153, 157 (CA 8-1961), the Eighth Circuit stated: "There appears to be no well defined or established federal common law as to the survival of tort actions for the vindication of personal rights."

plied. To the contrary, in this case, there was no existing, available statutory or common-law rule of survivorship.

The opinion below (545 F2d 984) quotes *Jobson vs Henne*, 355 F2d 129, 133 (CA 2-1966) for the rejection of immunity from Section 1983 actions for all state officials, but fails to recognize the numerous areas of immunity which have been carved out in §1983 actions, and which were most recently emphasized by this Court's decision in *Imbler vs Pachtman*, 424 US 409 (1976). *Nelson vs Knox*, 256 F2d 312 (CA 6-1958), cited by the Fifth Circuit (545 F2d 985), concerned itself only with the immunity of city officials under the Civil Rights Act and not with survivorship.

Reliance is placed by the appellate court (545 F2d 984) on the decisions of this Court in *J. I. Case vs Borak*, 377 US 426 (1964) and *Textile Workers vs Lincoln Mills*, 353 US 448 (1957), for the proposition that federal courts will recognize federal common law when it is necessary to carry out the congressional objectives of federal legislation. While the cited cases do stand for that proposition, it is important to note that in both decisions, federal remedies were created for federally defined offenses contained in statutes which make no reference whatsoever to state remedies,[15] and which are thus totally different from the Civil Rights Act which, through §1988, specifically incorporates the law of the forum state.

15. *Case* involved the Securities Exchange Act, and *Textile Workers* discussed remedies under §301(a) of the Taft-Hartley Act.

The two anti-trust cases cited by the Fifth Circuit (545 F2d 985, 986), *Barnes Coal Corp. vs Retail Coal Merchants Ass'n*, 128 F2d 645 (CA 4-1942) and *Rogers vs Douglas Tobacco Board of Trade*, 244 F2d 471 (CA 5-1957), are inapposite because, as stated at p. 648 of the *Barnes* decision, "Whether the action for damages created by the Sherman Act survives is to be determined by an interpretation of the statute". The distinction between the Sherman Act and the Civil Rights Act is obvious; the former does not incorporate state law while the latter, through §1988, defers to the law of the forum state.

The Fifth Circuit's citation (545 F2d 983) of *Pierson vs Ray*, 386 US 547 (1967) for the proposition that consent to an injury is not a defense available under Section 1983 regardless of its availability under State law is a direct misstatement of this Court's holding in *Pierson* that, as a factual conclusion, "We do not agree with the Court of Appeals that they [plaintiffs] somehow consented to the arrest because of their anticipation that they would be illegally arrested . . . the case contains no proof or allegation that they in any way tricked or goaded the officers into arresting them" (386 US 558).

No other court has ever applied "federal common law" to this issue - understandably, since there was none. To the contrary, every court previously deciding survivorship of a §1983 action has, pursuant to §1988, applied the law of the forum state. There is accordingly no precedent whatever for the decision below.

In a further effort to support its creation of a federal common law of survivorship, the Fifth Circuit opined that it

"is desirable because it fosters uniform application of the civil rights laws" (545 F2d 985). If Congress had desired uniform application of the civil rights laws, however, it could have, and would have, expressly provided for survival of a §1983 action. Instead, Congress enacted §1988 which incorporates the law of the particular forum state. In so doing, a legislative decision was made in favor of diversity.

This Court, in considering The Outer Continental Shelf Lands Act which includes a provision, much like § 1988, for adoption of applicable state laws not inconsistent with other federal laws [43 USC 1333(a) (2)], held that "Congress specifically rejected national uniformity and specifically provided for the application of state remedies". *Chevron Oil Co. vs Huson*, 404 US 97, 104 (1971).[16]

The only way there could be any such federal "uniformity" would be through Congress' repeal of §1988 and reversal of the several holdings of the federal courts recognizing the propriety of resort to the state law of survivorship under § 1988 [*e.g., Brazier vs Cherry, Pritchard vs Smith, Hall vs Wooten, Wolfer vs Thaler, Evain vs Conlisk, Holmes vs Silver Cross Hospital, Spence vs Staras, supra*] by an express amendment to the Civil Rights Act.

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16. *Basista vs Weir*, 340 F2d 74 (CA 3-1965), also cited by the Fifth Circuit to support its resort to a new "federal common law", rather than the applicable state law, does not in fact furnish such support. In that case, the court recognized that there was in existence, and had been for many years, a well-recognized body of "federal common law" as to recoverable damages, and that resort to §1988 was not even necessary with respect to the issue of damages. While the validity of that holding is not conceded, it is in any event not apposite here, since it has been recognized universally that there was no survival of actions at common law - state or federal - nor does the Civil Rights Act itself supply any rule of survivorship, so that §1988 must control the court in that regard.

The Fifth Circuit's contention that the federal common law it was creating fostered uniformity, pales in light of the fact that Congress specifically rejected any suggestion of uniform survivorship by enacting §1988, and that there has been no uniformity of survival of §1983 actions under previous decisions. That contention cannot negate the clear and unequivocal language of §1988 establishing the law of the forum state as determinative of the issue of abatement.

It is submitted that there is no basis whatever for a federal common law of absolute survivorship as devised by the court below, but that if any such federal common law is to be formulated, the federal courts should be persuaded, if not bound, by the various federal laws of survival,[17] including §1986 of the Civil Rights Act, all of which, whether relating to wrongful-injury actions or wrongful-death actions, are explicit "in the naming of dependent relatives who may recover and in (providing) the priority given to their claims". [18] The Louisiana law of survival of actions is accordingly entirely consistent with those federal laws of survival since all of the laws name dependent relatives who alone may pursue recovery, and the priority *inter se*.

This Court's decisions cited by the Fifth Circuit (545 F2d 985) are not authority for its holding. Two of the

17. The Federal Employers' Liability Act, 45 USC 59; the Jones Act, 46 USC 688; the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 908; and the Death on the High Seas Act, 46 USC 761, *et seq.* "The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law." *Moragne vs States Marine Lines, Inc.*, 398 US 375, 390-391 (1970).

18. *Moragne vs States Marine Lines, Inc.*, 398 US 375, 407 (1970). See Addendum 1.

cases, *Cox v. Roth* [19] and *Just vs Chambers*,[20] involved the issue of survival of a cause of action under the Jones Act and the Federal Employers' Liability Act upon the death of the tortfeasor, rather than the injured party. The classes of beneficiaries established by these acts were not at issue in either case.

The Fifth Circuit's attack on limited survival under the FELA through citation (545 F2d 986) to *Dellaripa vs New York, New Haven and Hartford R. Co.*, 257 F2d 733 (CA 2-1958), involves a faulty factual analogy. In *Dellaripa*, the wrongful-death action passed to the surviving father in whose behalf it was brought. The father died during the pendency of action, but the Second Circuit found that §59 of the FELA permitted the claim to survive. It is important to note that, in the case at bar, had Shaw's father survived him, this action could have been maintained by Shaw's father under Louisiana's Civil Code Article 2315.

Van Beeck vs Sabine Towing Co., Inc.,[21] supports petitioner's position that the law of Louisiana should be applied in the instant case. In *Van Beeck*, this Court recognized that, "[t]here being neither wife nor child nor father, the mother was the sole beneficiary of the statutory cause of action", but also recognized, as federal law, the rule, well-established in the state statutes, that the action once having devolved on a designated beneficiary, becomes a property right and passes to the estate of that party.[22]

19. 348 US 207 (1955).

20. 312 US 383 (1941).

21. 300 US 342 (1937).

22. 300 US at p. 343. This is clearly also the law of Louisiana. See Article 2315, La. Civil Code.

The appellate court also cited (545 F2d 983) the case of *Moragne vs States Marine Lines, Inc.*[23] However, *Moragne* involved an admiralty action for wrongful-death caused by unseaworthiness on state waters, as to which this Court had a "special responsibility for fashioning rules" [*Gillespie vs United States Steel Corp.*, 379 US 148, 155 (1964)] and with respect to which Congress had not already preempted that area of the law by enactment of an applicable statute as it has with the passage of §1988 in which it has effectively adopted the state law of survival of actions. Furthermore, this Court expressly reserved determination of the issue as to the beneficiaries who were entitled to recover under the remedy created in the *Moragne* case.[24] Moreover, the appellate court in the instant case failed to consider the recent dual holdings of the Court of Appeals for the Sixth Circuit in *Complaint of Cambria Steamship Co.*,[25] that the survivorship recognized in *Moragne* "exists *primarily* for the benefit of individual [dependent] beneficiaries, and general losses to the estate are not recoverable", and that there is no basis "to hold that a non-dependent and collateral relative should recover for loss of an inheritance, based solely upon his legal relationship to the deceased as next of kin".

Similarly, the appellate court's reliance (545 F2d 985) on *Roberson vs N. V. Stoomvaart Maatschappij*, 507 F2d 994 (CA 5-1975), for the rejection of Article 2315 is totally inappropriate because, as the Fifth Circuit observed in that

23. 398 US 375 (1970). In *Moragne*, this Court pointed out that the Admiralty "developed general principles unknown to the common law" which "included a special solicitude" for seamen (p. 387).

24. 398 US at p. 408.

25. 505 F2d 517 (CA 6-1974), at pp. 523-24, cert. den. 420 US 975.

decision at p. 995, "Federal Maritime Law . . . now can operate to award damages for wrongful death or survivorship directly. No resort to state law is necessary". In the case at bar, resort to state law is mandated by § 1988. There is no such mandate in the general federal maritime law.

The Fifth Circuit, quoting the district court, stated that "we emphasize at the outset that we are not concerned with wrongful-death actions" (545 F2d 983). However, the district court recognized - and the appellate court apparently did not disagree - that the rule under Louisiana Civil Code Article 2315 limiting survival of actions to designated beneficiaries, applies to both wrongful-death and wrongful-injury actions. Thus, were this a wrongful-death action under the Civil Rights Act, the lower courts would apparently have applied the law of Louisiana and have dismissed the action of Shaw's executor, since none of the designated beneficiaries exists.

It seems obvious, however, that there is all the more reason to dismiss the present action which does not arise from a death caused by a civil rights violation, but involves only damages in the nature of malicious prosecution, rather than making those damages recoverable by a non-related, non-dependent residuary legatee who was merely a friend of the original plaintiff.

In sum, there has been in existence no federal common-law of survivorship of civil personal actions - to the contrary, the long-standing rule of common law was that such an action abated with the death of the injured party - and there is no real authority for the federal court now to create a federal common law of survivorship of an action under

§ 1983 of the Civil Rights Act when Congress itself did not see fit legislatively to ameliorate the existing rule, and in fact patently refused to do so, other than by enacting § 1988 of that Act.

The issue which was very forcefully urged upon the Fifth Circuit by the appellants in the *Brazier* case, was that by reason of certain language §1983 itself, Congress had effectively brought into the Civil Rights Act the existing common law of non-survivorship, so that no state statute providing for any modicum of survivorship whatever could be adopted and applied under §1988 since all state survivorship statutes were in conflict with the Act. However, the Court in *Brazier* rejected that argument and held unequivocably that Congress had remained entirely silent as to survivorship of §1983 actions - had left a "gap" in the law. Thus, it concluded that Congress had enacted §1988 to fill that gap insofar as state law will permit.

However, the Fifth Circuit, in this case, while giving lip-service to §1988 and the holding of *Brazier*, and ostensibly following the procedural steps provided in §1988 in looking to state law, now seeks to accomplish indirectly, by the fabrication of a "federal common law", what Congress itself had directly refused to do (except only in §1986 providing for restricted survivorship with respect to actions under §1985)[26] - ameliorate the existing common law as to abatement of actions, and bring into the Civil Rights Act a rule of absolute survivorship of actions under §1983.

26. Comparison of the express provisions in §1986 for survivorship, however limited, of §1985 actions and the complete absence of any such provision in the Civil Rights Act with respect to §1983, and consideration of the Congressional history of the Act and Representative Shellabarger's own criticism of Congress for not having enacted the survivorship provision which he had championed (*supra*, fn. 6), are stark evidence of Congressional intent not to adopt any rules of survivorship except as expressly set out in §1986 and in state statutes to be applied as directed by §1988.

If the rule of absolute survivorship, and the objective of uniformity of survivorship throughout the entire federal system, of civil rights actions under §1983, is so desirable, the solution is quite clear and simple. Such amelioration of existing common law should be brought into the Civil Rights Act through appropriate statutory amendment enacted by the duly-elected representatives of the people, and not by means of judicial legislation by the appointed federal judiciary in creating a new federal common law of absolute survivorship for civil rights actions when none had ever existed.[27]

CONCLUSION

The legal effect of the holding below is to write §1988 right out of the Civil Rights Act. The Fifth Circuit's position is that unless a state law being applied under §1988 provides fully for survival of the action, it will be rejected rather than being extended to and governing the disposition of the case.

In short, if the lower court's decision is maintained, a civil rights action under §1983 will always survive regardless of the situation - *i.e.*, there is absolute survivorship. Such a holding is not consonant with numerous previous decisions. Moreover, if that had been the Congressional intent in enacting the Civil Rights Act, it seems obvious that Congress would simply have so provided in the statute.

27. "Unlike statutes, court decisions do not come into being as a result of electoral processes which give them legitimacy in a democratic society." Winter, *The Growth of Judicial Power*, National Legal Center for the Public Interest, National Conference: "The Role of the Judiciary in a Democratic Society" (1977), p. 42.

The Louisiana law provides for the limited survival of such actions for personal damages. In its legislative wisdom, Louisiana restricted the right to pursue the action past the plaintiff's death, to those closest members of his family -- his spouse, his children, his parents or his brothers or sisters. Contrary to this being in conflict with federal law, it is exactly the same philosophy and policy underlying, and is quite consistent with, every federal statute which provides for any survival of action - including § 1986 of the Civil Rights Act. Thus, whether the action involves an injury to a railroad worker under FELA, a member of a crew of a vessel - that long protected "ward of the Admiralty" - under the Jones Act, a longshoreman or harbor worker, or "invidious discrimination" resulting in death to the person deprived of his civil rights, it survives only in favor of the designated dependent kin.

The law of Louisiana set out in Civil Code Article 2315, is "not inconsistent with the Constitution and laws of the United States", and therefore, under the express mandate of §1988 of the Civil Rights Act, that law "shall be extended to and govern" the courts in the "disposition of the cause".

In enacting the Civil Rights Acts, Congress rejected my provision for survivorship of actions under §1983, other than the incorporation of the state law of survivorship, when such exists, as directed by §1988. As Justice Rehnquist stated in *Jimenez vs Weinberger*, 417 US 628 (1974), "Courtrooms should [not] become forums for a second round of legislative hearings whenever a legislative determination is later challenged" (p. 641).

In the present case, plaintiff Shaw left no surviving

spouse, parent, child, brother or sister, or any other dependent kin. His sole residuary legatee is merely a friend.

However close that friendship may have been, there is no basis for "special solicitude" (*Moragne, supra*, fn. 23), and no authority whatever – in the common law, the federal common law, the Louisiana codal provisions or the federal statutes - for the extention of survivorship of a pending action for personal injury to such a non-dependent, non-relative of the deceased plaintiff.

For all of the foregoing reasons, it is submitted that the judgment below should be reversed and plaintiff's claim dismissed.

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ADDENDUM 1

FEDERAL LAWS OF SURVIVAL

WRONGFUL-INJURY ACTION

STATUTE	BENEFICIARIES
FELA (45 USC 59)	Permits survival of the decedent's wrongful-injury action for the benefit of the surviving widow and children, parents and next of kin dependent on the decedent.
JONES ACT (46 USC 688)	Incorporates provisions of FELA by reference.
LHWCA (33 USC 908)	In the event of death of an employee receiving compensation for permanent partial disability, the total unpaid amount of the award is payable to the surviving widow, child, and dependent grandchildren, brothers, sisters, and other persons who satisfy the definition of the term dependent in 26 USC 152.

WRONGFUL-DEATH ACTION

FELA (45 USC 51)	Creates an action for wrongful death for the benefit of the surviving widow and children, parents, and next of kin dependent on the employee.

JONES ACT (46 USC 688)	Incorporates provisions of FELA by reference.
LHWCA (33 USC 909)	Creates a "death benefit" in favor of surviving widow, child, and dependent grandchildren, brothers, sisters, and other persons who satisfy the definition of the term dependent as defined in 26 USC 152.
DOHSA (46 USC 761)	Creates an action for wrongful death for the benefit of the decedent's wife, husband, parent, child, or dependent relative.

ADDENDUM 2

STATE LAWS OF SURVIVAL

SURVIVAL STATUTE	EXCLUSIONS
Ala. Code Ann. § 6-5-642 (1975)	Excludes actions for injuries to reputation.
Alas. Stat. Ann. §09.55.570 (1962)	Excludes actions for defamation.
Ariz. Rev. Stat. Ann. §14-3110 (1975)	Excludes actions for breach of promise to marry, seduction, libel, slander, separate maintenance, alimony, loss of consortium, and invasion of right of privacy.
Ark. Stat. Ann. §27-901 (repl. ed., 1962)	
Calif. Probate Code §573 (Deering, 1974)	Excludes damages for pain, suffering or disfigurement.
Colo. Rev. Stat Ann. §13-20-101 (1973)	Excludes actions for slander and libel, and damages recoverable are limited to loss of earnings and expenses sustained or incurred prior to death, and does not include damages for pain, suffering or disfigurement nor prospective profits or earnings after date of death. Also excludes punitive damages after death of party against whom claimed.

Conn. Gen. Stat. Ann. §52-599 (1958)	Excludes actions for which the object is defeated or rendered useless by the death of any party thereto and those whose prosecution or defense depends on the continued existence of the persons who are plaintiffs or defendants and civil actions upon a penal statute.
Del. Code Ann. tit. 10, §3701(Rev. 1974)	Excludes actions for defamation, malicious prosecution and actions upon penal statutes.
Fla. Stat. Ann. §46.021 (1969)	
Ga. Code Ann. § 3-505 (rev. 1975)	
Hawaii Rev. Stat. §634-61 (Act 109 of 1973)	
Idaho Code Ann. §5-327 (Supp. 1977)	Excludes actions for slander and libel.
Ill. Ann. Stat ch. 3, §339 (Smith-Hurd, 1961), ch. 110, §54 (Smith-Hurd, 1968)	Excludes actions for slander and libel.
Ind. Ann. Stat. §34-1-1-1 (Burns, 1973)	Recovery for personal injuries limited to medical, hospital and nursing expense and loss of income of decedent resulting from the injury, from the date of the injury to the date of death.

Iowa Code Ann. §§ 611.20, 611.22 (1950)	
Kan. Stat. Ann. §§60-225 60-1801 to 1802 (1976)	Excludes actions for slander, libel, malicious prosecution or for a nuisance.
Ky. Rev. Stat. Ann. § 411.140 (1972)	Excludes actions for slander, libel, criminal conversion, and malicious prosecution.
La. C.C. Article 2315	As to actions other than property damage, excludes recovery by persons other than spouse and/or children, parents, brothers and/or sisters.
Me. Rev. Stat. Ann. tit. 18, § 2501 (Supp. 1977-1978)	Excludes actions for recovery of penalties of forfeiture of money under penal statutes.
Md. Ann. Code CJ § 6-401 (1974)	Excludes actions for slander.
Mass. Ann. Laws ch. 228, §§ 1, 4 (1974)	
Mich. Stat. Ann. §§27A.2921, (rev. 1962) 27A.5852, (rev. 1977)	Actions for injury to the person die with the person in whose favor they exist.
Miss. Code Ann. §91-7-233 (1972)	
Mo. Ann. Stat. §§537.020, 537.030 (1969)	Excludes actions for libel, slander, assault and battery, and false imprisonment.

Mont. Rev. Code Ann. §93-2824 (repl. ed. 1964)	
Neb. Rev. Stat. Ann. §§25-1401, 1410 (reissue, 1975), 25-1402 (reissue 1975)	Excludes actions for libel, slander, malicious prosecution, assault and battery, and for a nuisance.
Nev. Rev. Stat. § 41.100 (1973)	
N.H. Rev. Stat. Ann. §§556:9-15 (repl. ed. 1974)	Excludes actions for recovery of penalties and forfeitures of money under penal statutes.
N.J. Stat. Ann. §§2A:15-3 (Supp. 1977-1978) 2A:15-4 (1952)	
N.M. Stat. Ann. §§21-7-4, 21-7-10 (repl. ed., 1970)	Excludes actions for libel, slander, malicious prosecution, assault and battery, nuisance, and actions against a justice of the peace for misconduct in office.
N.Y. E.P.T.L. §11-3-2 (Supp. 1977-1978)	Excludes recovery of punitive damages and penalties.
N.C. Gen'l. Stat. Ann. §§28A-18.1 (Supp. 1975)	Excludes actions for libel, slander (except slander of title), false imprisonment and where the relief sought could not be enjoyed or granting it would be nugatory after death.

N.D. Cent. Code Ann. §§28-01-26.1, R. Civ. P 25(a) (repl. ed., 1974)	Excludes actions for breach of promise, alienation of affections, libel, and slander.
Ohio Rev. Code Ann. §§2311.21 (Baldwin, 1971) R. Civ. P. 25(a) (Baldwin repl., 1972)	Excludes actions for libel, slander and malicious prosecution, nuisance or against a judge of a county court for misconduct in office.
Okla. Stat. Ann. tit. 12, §§1052, 1080 (Supp. 1977-78)	Excludes actions for libel, slander and malicious prosecution.
Ore. Rev. Stat. § 30.075 (repl. 1975)	Damages recoverable for injury to the person must not exceed $25,000 and are limited to reasonable expenses paid or incurred for doctor, hospital or nursing services for the deceased and for his loss of earnings.
Pa. Stat. Ann. tit. 20, §§ 3371, 3373 (Purdon, 1975)	Excludes actions for slander or libel.
R.I. Gen'l. Laws Ann. §§9-1-6, 9-1-7 (reenactment, 1969)	
S.C. Code Ann. §§15-5-90, 180 (1976)	

S.D. C.L. §§15-4-1, 15-4-2 (1967)	
Tenn. Code Ann. §§20-605 (1955), 20-602 and 607 (1977 Supp.)	Excludes actions for wrongs affecting the character of the plaintiff.
Tex. Rev. Civ. Stat. §5525 (Vernon, 1958)	
Utah Code Ann. §78-11-12 (Supp. 1975)	Excludes claims for pain and suffering.
Vt. Stat. Ann. tit. 14, §§ 1451-52 (repl. ed., 1974)	
Va. Code Ann. §§8.01-22 8.01-25, 8.01-50 (repl.ed. 1977)	Excludes punitive damages after death of party causing the injury.
Wash. Rev. Code Ann. § 4.20.046 (1962)	Excludes recovery for damages for pain, suffering, anxiety, emotional distress, humilitation, personal to and suffered by deceased.
W. Va. Code Ann. §55-7-8a (1966)	
Wisc. Stat. Ann. §§269.13 (1957) 287.01 (Supp. 1977-1978) 895.01 (Supp. 1977-1978)	Excludes actions for slander or libel.
Wyo. Stat. Ann. §§1-26 to 28 (1957)	